UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARDX	
NEWARK EXTENDED CARE,	22-RC-13203
Employer, 1199 SEIU, UNITED HEALTHCARE WORKERS EAST, NEW JERSEY REGION,	INTERVENOR'S BRIEF IN SUPPORT OF EXCEPTIONS
Petitioner,	
LOCAL 707 HEALTH EMPLOYEES ALLIANCE, RIGHTS AND TRADES,	
Intervenor.	

This brief is submitted by Intervenor Local 707 HEART in support of its Exceptions to the Report of the Administrative Law Judge, issued August 2, 2011.

EXCEPTION 1

The ALJ recommends a misapplication of case law with respect to false statements made by Petitioner 1199 SEIU concerning an audit report by the United States Department of Labor (hereinafter "USDOL"). These statements were misrepresented under the auspices of the USDOL audit and had a serious impact upon the bargaining unit and the election results.

Objection 7 asserts that "Local 1199 staffers and supporters handed out leaflets containing clearly slanderous and defamatory materials." SEIU staffers and supporter handed out leaflets and placed them inside the facility which were knowingly false, as well as purposely misleading, concerning a Department of Labor audit of Local 707. As seen in Intervenor's Exhibit 18, the question "What has Odette done with our Union dues" is followed by misleading photographs of

parties (all family events) which preceded both the audit and the formation of Local 707.

The blatantly false statement is made under the heading "Cooking the Books" where Local 1199 asserts that the Department of Labor found numerous bookkeeping violations, "including failure to maintain adequate receipts to explain how out union funds were spent." The U.S. Department of Labor report on the audit, which is posted on the Department of Labor website states, as follows:

The audit of Local 707 HEART's 2006 to 2007 records revealed the following record-keeping violations: The union did not maintain adequate records by officers to the union and/or payments by the officers on behalf of the union to pay its operating expenses during fiscal years 2006 and 2007.

Local 1199 was fully aware that no dues were ever collected by Local 707 until after the certification of the 2008 election. The statement that dues money was audit is false and Local 1199 knew it to be false. The statement that bookkeeping violation had to do with *how* dues money was spent was also a knowingly false statement because the audit only mentions receipts "by officers to the Union and their payments "on behalf of the union to pay its operating expenses during fiscal years 2006-2007."

Testimony established that this leaflet had a profound effect on members and cause them to question, without any basis in fact, the fiscal responsibility and honesty of Local 707 officers.

Although the NLRB does not "police or censor propaganda" used in elections and leaves to the "good sense of the voters" the appraisal of such matters, it will set aside an election where a material fact has been misrepresented in the representation campaign; opportunity for reply has been lacking; and the misrepresentation has had an impact on the free choice of the employees participating in the election. Hollywood Ceramics Co., 140 N. L. R. B. 221, 223-224 (1962); F. H. Snow Canning Co., 119 N. L. R. B. 714, 717-718 (1957). Statements uttered with actual malice, "a deliberate intention to falsify" or "a malevolent desire to injure" will result in setting aside election results. Bettcher Mfg. Corp., 76 N. L. R. B. 526 (1948); Atlantic Towing Co., 75 N. L. R. B. 1169, 1170-1173 (1948). The Act does not give either party license to injure the other intentionally by circulating defamatory or insulting material known to be false. See Maryland Drydock Co. v. Labor Board, 183 F. 2d 538 (C.A. 4th Cir. 1950).

These malicious and false statements made during the Local 1199 campaign had such a profound effect on the election as to require that it be set aside. Clearly , the bargaining unit was misled to believe their dues were misappropriated when in fact no Local 707 dues were ever audited by the U.S. Department of Labor and the only bookkeeping violation was a failure by officers to maintain records of their own personal funds spent on behalf of the Union (thus jeopardizing their later

reimbursement). The misleading nature of the statements, rather than their defamatory quality, had a profound effect upon the election.

Election results will be set aside when challenged because of misrepresentations in campaign propaganda where: "(1) there has been a material misrepresentation of fact, (2) this misrepresentation comes from a party who had special knowledge or was in an authoritative position to know the true facts, and (3) no other party had sufficient opportunity to correct the misrepresentations before the election." *Celanese Corp. v. NLRB*, 291 F.2d 224, 226 (7th Cir. 1961); see NLRB v. Bonnie Enterprises, Inc., 341 F.2d 712, 714 (4th Cir. 1965); Annot., 3 A.L.R.3d 889 (1965); cf. *Linn v. United Plant Guard Workers*, 383 U.S. 53, 60, 86 S.Ct. 657, 15 L.Ed.2d 582 (1966).

The malicious misrepresentations were disseminated among the entire bargaining unit and invoked the U.S. Department of Labor for a false sense of credibility. Local 707 did not have ample opportunity to rebut the misrepresentation and neutralize the damage done in the name of the Department of Labor.

EXCEPTION 2

The ALJ erroneously disregarded the objection and evidence in support of the objection that the Employer's agents were campaigning for 1199 SEIU on election day, by (a) characterizing the objection based on statements by the nursing home gift shop manager as "unalleged conduct", (b) erroneously assuming it was withdrawn as part of Objection #4, and (c) by stating that David Serrano merely "works" in

gift shop when unrebutted testimony established that he ran and managed the gift shop for the Employer.

Both Objection 1 and 4 asserted that the employer campaigned and made statements in support of SEIU 1199. Withdrawn Objection #4 was specifically related to the campaign promises in conjunction with mention of the Employer's desire to avoid pension withdrawal liability. 1199 SEIU and Employer representative made specific statements about pension and withdrawal liability.

The making of the statements were nevertheless facts in support of inferences relevant to other objections and cannot be disregarded.

The conduct of David Serrano, Gift Shop manager, was also presented as evidence in support of Objection #1 at the hearing. The testimony of Gail Chatman established that management employee David Serrano, who is in charge of the facility gift shop, was campaigning for Local 1199 on election day from and just outside of the gift shop, which is adjacent to the voting area. Specifically, Serrano was praising the SEIU Pension and stating that Local 707 had no pension fund.

EXCEPTION 3

Erroneously finding that, treated separately, each instance of campaigning and support by agents of the Employer had an insufficient impact on voters, while ignoring the totality of the violations and their corroboration of the inference that the Employer overtly supported SEIU 1199 such as (a) Employer's desire to avoid further withdrawal liability to SEIU pension fund (as stated by SEIU staffers), (b) the Employer's treatment of Local 707 and refusal to schedule grievances

after imposition of withdrawal liability; and (c) conduct of Employer's agents such as the security guard, gift shop manager and supervisors on election day.

EXCEPTION 4

Erroneously finding that the Employer's documented failure to schedule grievances and failure to fully execute its promise to reimburse employees for medical bills, in resolution of grievance that health insurance plan was not comparable to predecessor plan, did not cause disaffection among the bargaining unit when the record establishes that (a) 1199 SEIU campaigned the slogan "Local 707 why so long for grievances" and (b) disaffection based failure to provide promised reimbursement is self-evident. Documentation shows that although Employer paid some bills as promised, it stopped reimbursements a few months before election.

Objection 1 asserts that "NEC, both independently and in collusion with Local 1199, created a hostile environment that assisted 1199 to get more votes than 707 HEART by purposely delaying the grievance process; allowing their agents and management employees to campaign for Local 1199, and by allowing union employees to campaign for Local 1199 during work hours." The testimony of witnesses, including Local 707 delegates who handled grievances and Local 707 President Odette Machado, who communicated with Employer regarding scheduling of grievances, establishes that the Employer delayed the grievance process and schedule of meetings during the period from November 2010 until just prior to the election in April 2011. Employees became disaffected of 707 HEART while Local; 1199 campaigned that Local 707 was not processing grievances for

the crucial months leading up to the election. *See* emails in evidence as Intervenor's Exhibit 27.

The testimony of Odette Machado and Intervenor's Exhibits 20-21 also establish that this breakdown of Labor-management relations immediately followed the imposition of withdrawal liability upon the employer by SEIU pension fund. From that point on the employer's actions were consistent with an intent to cause disaffection among local 707 members and to facilitate the return of Local 1199 to the facility. As stated by management (Ms. Elky) in the presence of local 707 delegates at a labor management meeting: "Maybe the workers should have stayed in 1199."

EXCEPTION 5

Erroneously finding that Marie St. Louis did not intentionally sabotage employee's grievances entrusted to her as a delegate, when evidence conclusively established that she openly supported 1199, lied in her capacity as delegate and reported to management what transpired at union delegate meetings.

All of the Local 707 delegates who testified, including Sheffield, Parker, Chatman testified that St Louis purposely held back the grievances passed to her, as a Local 707 delegate, by workers on her shift. These employees believed their grievances were being ignored because Marie St. Louis purposely denied their existence. Testimony shows that this was done with health insurance grievances while Local 1199 campaigned extensively on that issue. The delegates, as well as

Odette Machado corroborated that Marie St Louis knowingly and falsely stated that employees on her shift had no complaints at delegate meetings and at labor-management-meetings. She withheld information for processing employees Health Insurance claims from employees on her shift.

In addition management allowed Local 707 supporter and election observer Ms. Billings to campaign during work hours and, on election day, observe during work hours without permission. Testimony of Odette Machado, Gail Chatman and Dessie Thompson established that Billings was being paged and the facility supervisor Ms. Elky questioned why she was in the break room without permission and without calling in. Despite the fact that Billings was a "no call/no show" on election day, she was never disciplined by the employer. This presumptuousness is further evidence of the collusion between Local 1199 and the Employer.

St Louis spearheaded a campaign improperly based on ethnicity and nationality, securing the entire Haitian vote for Local 1199. Witnesses testified to statements by St' Louis and others (Ms. La Rue) that "if you are Haitian you must vote for Local 1199." The discriminatory campaign was further given "teeth" when coupled with the coercion created by St' Louis' abuse of staff assignments.

EXCEPTION 6

Erroneously treating Employer's security guard (agent as a matter of law) as a "third-party and thus minimizing the affect of statements ("vote 1199") on voters.

EXCEPTION 7

Erroneously attributing inconsistent testimony to Odette Machado, President of Local 707, regarding receipt of a rest room key, when in fact it was the security guard who was inconsistent based on the testimony of Jacqueline Allen who testified that she handed the key to Machado, and not the security guard as the security guard testified (i.e. ALJ got it backwards).

Objection 3 asserted that "NEC Security Guard harassed Union President Odette Machado by demanding Ms. Machado to move from the lobby of the facility, while permitting Local 1199 representatives to remain in the area." Despite her attempts to justify her conduct, it is clear from the credible testimony that NEC Security Guard, Victoria Oyerinde harassed Union President Odette Machado by demanding Ms. Machado to move from the lobby of the facility, while permitting Local 1199 representatives to remain in the area. showed her allegiance by readily adopting the incorrect position of Local 1199 representative Elliot to attempt the ejection of the incumbent Union. She was accompanied by a lower level supervisor of the Employer to the election area in an attempt to get NLRB agent support Local 1199's demand (Ms. Machado had already cleared her visit that day with Ms. Elky). The Security Guard eventually backed down because Ms. Machado persisted in asserting her right, as incumbent union, to remain in the lobby. She nevertheless abused her authority and her actions were sanctioned by agents of the Employer.

More significantly, the credible testimony of Odette Machado establishes that NEC Security Guard Victoria told employees outside the restroom in earshot of Machado to "vote for 1199". The security guard's credibility is called into question by the fact that she lied about handing Ms. Machado the restroom key to avoid placing herself outside the restroom where testimony establishes she was campaigning for Local 1199. She also attempted to deny her entry into the break-room after testifying that a photograph depicted here "on her way out" of the election area.

EXCEPTION 8

Erroneously finding that parking the SEIU lettered bus where it was visible from the break room window was not a violation of the no electioneering rule because it was "not in the area established by the Board Agent," when it still constituted campaigning on election day. ALJ also erroneously stated that only "two voters" saw the bus from the election area. Two witnesses testified to that fact and further testimony was not necessary and would have been cumulative. It was sufficient to establish that the bus and large SEIU lettering was visible from the election area, where obviously all voters were present to vote.

EXCEPTION 9

Erroneously disregarded proven instances of campaigning in the workplace on election day by stating that it was the Employer's responsibility" to regulate conduct outside the election area ("break room") and by failing to state in his Decision why the wearing of 1199 SEIU tee-shirts and jackets in the election area was not a violation.

Objection #5 asserted that "Local 1199 staffers were campaigning at the facility in violation of the "no campaign within 24 hours of the election" rule." The photographs of the SEIU Local 1199 bus and the testimony of eye-witnesses

established that Local 1199 parked its purple bus in front and around the facility, the day before and during both voting shifts on the day of election. In particular the bus was visible from the break-room voting area during the election. This violation was brought to the attention of the NLRB agent, however, Local 1199 willfully disregarded the direction of agent Frank Flores to move the bus. Ricky Elliot's assertion that he never heard any such direction merely corroborates that Local 1199 ignored the agent. Local 1199 continued to drive and park its purple SEIU bus around the facility on the day of election.

Testimony also established that SEIU staffers continued to wear their purple shits and jackets with insignia through the election day both in and around the facility. Photographs show the shirts and jackets being work at the entrance to the facility and even in the break-room election area. The electioneering destroyed the atmosphere necessary to the exercise of a free choice in the representation election.

A letter, dated April 13, 2011, was introduced by Local 1199 staffer Ricky Elliot and is in evidence as Petitioner's Exhibit 14. He testified that it was from the Local 1199 attorney but clearly it was signed by him. Despite its unfounded charge of unequal treatment, the letter clearly asserts his intention to campaign on election day. No evidence on any campaigning by Local 707 was introduced at the hearing. This letter pus the premeditated intent on the numerous acts of

campaigning (Bus, Jackets, Security Guard, Gift Shop manager, etc.) on election day that actually occurred.

EXCEPTION 10

Erroneously minimizing the impact upon voters of 1199 SEIU supporters actively campaigning on election day, especially when the impact of such conduct is considered together with the conduct of agents of the Employer and SEIU 1199 staffers on election day.

Some of the established conduct of 1199 SEIU and the Employer and the statements of their agents cannot be weighed in a vacuum or separated and each minimized. They are related in theme (i.e. delayed grievances, withdrawal liability, pension fund). Moreover the treatment of Local 707 at the facility with impunity as well as the electioneering on election day cannot be overlooked. The combined weight of these violations and incidents warrants a new election.

CONCLUSION

Based on the foregoing, the election results should be set aside and a new election held.

Respectfully submitted,

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STATEMENT OF SERVICE

NEWARK EXTENDED CARE CASE No. 22-RC-13203

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